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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

In re the Marriage of CANDACE A. and
JOHN S. TINCHER.

CANDACE A. QUATTLEBAUM,

Appellant,

v.

JOHN S. TINCHER,

Respondent.

C047312

(Super. Ct. No.
SDR9521)

Candace and John Tincher separated in June 1997 after a 10-year marriage. They have two children, Judith and Katherine. Although Candace was initially awarded physical custody of both girls under a stipulated judgment, Judith moved back and forth between her parents beginning in August 2002. Candace's current husband adopted Katherine at that time and assumed financial responsibility for her. In June 2003, when Judith was living with Candace, the trial court imputed income of \$2,000 per month

to Candace and ordered John to pay Candace \$1,173 per month in child support. John filed an order to show cause on February 27, 2004, seeking modification of the June 2003 order because Judith had been living with him since mid-November 2003. John also sought reimbursement of health care costs, reimbursement of overpaid child support, and attorney's fees and costs.

Appearing in propria persona, Candace appeals from the May 21, 2004, order directing her to: (1) pay John \$382 per month in child support; (2) reimburse John for 100 percent of Judith's health expenses between February 27, 2004 and February 26, 2005; (3) pay one-half of Judith's health expenses starting on February 27, 2005; and (4) pay John \$9,000 in attorney's fees and \$36 in costs as a sanction under Family Code section 271.¹ Candace contends that the trial court abused its discretion in the June 2003 order by imputing to her an income of \$2,000 per month and in the May 2004 order in assessing sanctions of more than \$9,000. There is no respondent's brief.

We conclude that challenges to the June 2003 order are untimely. We modify the May 2004 order to strike the amount of sanctions in excess of actual attorney's fees and costs paid by John and direct the trial court to permit Candace to pay that

¹ Undesignated statutory references are to the Family Code.

obligation in manageable installments. We affirm the order in all other respects.

FACTUAL AND PROCEDURAL BACKGROUND

John's February 2004 order to show cause sought child support of \$577 per month from Candace, reimbursement of Judith's uncovered health care costs, reimbursement of overpaid child support in the sum of \$4,692 for November 2003, December 2003, January 2004, and February 2004, and for attorney's fees and costs then totaling \$2,736. John explained in his declaration that he had been paying Candace child support in the amount of \$1,173 per month, most recently by wage garnishment, pursuant to the June 2003 court order. After Judith returned to live with him on November 14, 2003, John and his attorney had asked Candace on several occasions to voluntarily stipulate to release of the wage garnishment, but according to John, she "refused until recently."

Candace filed an order to show cause, apparently in response to John's. She agreed that John should have physical custody of Judith, but complained that John and the social worker made it difficult for her to arrange parenting time with her daughter. As to child support, Candace cited section 3653 and argued that John was not entitled to reimbursement for child support paid before he filed his order to show cause. At the same time, Candace stated that she had not cashed the child support checks she received for December 2003, January 2004, and

February 2004 and had offered to return them to John's attorney. Candace claimed that she was entitled to the November 2003 child support payment because Judith lived with her for most of the month. She also stressed that the child support issue was moot because she stipulated to release of the wage garnishment before John filed his order to show cause. Candace asked that "pursuant to section 271 of the Family Code that [John] be required to pay [her] attorney fees and costs in the amount of \$5,036.30 for his failure to cooperate in allowing [her] parenting time with [their] child." She complained that "pursuant to 271, [John] and his attorney have wasted time and money filing an Order to Show Cause . . . for the purposes of determining several moot points." On the question of her entitlement to section 271 sanctions, Candace also cited the refusal by John's attorney to continue the hearing on John's order to show cause in order to combine it with the hearing on her own order to show cause. In addition, Candace maintained that John had not, in fact, incurred attorney's fees in filing the order to show cause because a friend was representing him. Candace filed an updated income and expense declaration in which she stated that she was a homemaker last employed in 1998. She explained her negative income, stating: "I have been out of the job market for the past 6 years and have no training, degrees or work experience. I will only be able to obtain minimum wage employment at about \$1,120 gross/per month."

John's responsive papers filed April 30, 2004, challenged as false Candace's claims that he had frustrated her attempts at visitation, failed to meet and confer on the child support issue, and was not paying his attorney for legal services rendered. Although Candace acknowledged in an e-mail to John's attorney in March 2004 that the child support paid to her in December 2003, January 2004, and February 2004 should be returned to him, she did not return the money. In his responsive papers, John cited the June 2003 order which imputed \$2,000 per month income to Candace and asked the court to impute \$3,000 of income to her due to changed circumstances. He also asked the court to award him an estimated \$4,981.95 in attorney's fees incurred since January 2004 "to clearly signal to the parties that their conduct in failing to agree on routine matters, such as accountings, will not be tolerated by the court."

On May 19, 2004, the trial court conducted the hearing on John's order to show cause by conference call. Both parties were represented by counsel. There is no reporter's transcript of the hearing. The court found that "[d]espite the fact that Judith went to live with [John], [Candace] continued to collect and cash the child support payments under the prior order." It characterized Candace's refusal to return the child support for December 2003, January 2004, February 2004, and March 2004 as "unconscionable," but ruled that support could not be modified

retroactively to a period before John filed his order to show cause. Based on the earlier June 2003 order which imputed \$2,000 in earnings to Candace, the court ordered her to pay John \$382 per month in child support. With respect to John's request for attorney's fees, the trial court stated: "The court is quite clear that these parties will not stop this litigation until Judith is 18 and graduated from high school. Under Family Code 271, based on all the factors, including income, assets, and the divisive action taken by [Candace] the court orders [her] to pay [John] attorney fees in the amount of \$9,000 and costs in the amount of \$36.30. Said amount shall be payable forthwith."

DISCUSSION

I

Challenges to the June 2003 Order are Untimely

Candace argues the trial court abused its discretion in imputing income of \$2,000 per month to her when calculating the amount of child support to be paid to John. She acknowledges that the court had, in fact, imputed that amount of income in its June 20, 2003 order, but states that "this imputation of income was not an issue for [her] at that time since child support was being paid to [her] from John." Candace correctly anticipates a problem with her attempt to challenge the June 2003 ruling in this appeal. The court set the amount of

imputed income in the June 2003 order, and the order is now final.

Postjudgment orders modifying child support are appealable under Code of Civil Procedure section 904.1, subdivision (a)(2). (*County of Ventura v. Tillet* (1982) 133 Cal.App.3d 105, 111, questioned on another ground in *County of Los Angeles v. Soto* (1984) 35 Cal.3d 483, 492, fn. 4; see also *In re Marriage of Tibbett* (1990) 218 Cal.App.3d 1249, 1250, disapproved on another ground in *In re Marriage of Comer* (1996) 14 Cal.4th 504, 515.) The fact that the court ordered John to pay child support to Candace does not excuse her failure to appeal from the June 2003 order. A party may be legally aggrieved even if the judgment as a whole was entered in that party's favor. The aggrieved party is entitled to appeal from the portion of the judgment that was unfavorable. (See *Zarrahay v. Zarrahay* (1988) 205 Cal.App.3d 1, 4.) We deny as untimely Candace's attempt to challenge the June 2003 order in this appeal.

II

The May 2004 Order

Section 271, subdivision (a), provides: "Notwithstanding any other provision of this code, the court may base an award of attorney's fees and costs on the extent to which the conduct of each party or attorney furthers or frustrates the policy of the law to promote settlement of litigation and, where possible, to reduce the cost of litigation by encouraging cooperation between

the parties and attorneys. An award of attorney's fees and costs pursuant to this section is in the nature of a sanction. In making an award pursuant to this section, the court shall take into consideration all evidence concerning the parties' incomes, assets, and liabilities. The court shall not impose a sanction pursuant to this section that imposes an unreasonable financial burden on the party against whom the sanction is imposed. In order to obtain an award under this section, the party requesting an award of attorney's fees and costs is not required to demonstrate any financial need for the award." We will not disturb an order for sanctions under section 271 "unless the trial court abused its broad discretion in making it." (*In re Marriage of Petropoulos* (2001) 91 Cal.App.4th 161, 178 (*Petropoulos*).)

Candace cites three reasons in support of her claim that the trial court abused its discretion in awarding John \$9,000 in attorney's fees under section 271. First, she argues that John failed to give her notice that he was seeking section 271 sanctions. Second, Candace challenges the sufficiency of the evidence to support the trial court's finding that her conduct frustrated settlement of the child support issues. Third, she argues that the order to pay John \$9,000 in sanctions "forthwith" places an unreasonable burden on her.

We begin by rejecting Candace's claim that she lacked notice that John sought section 271 sanctions. Section 271,

subdivision (b), provides: "An award of attorney's fees and costs as a sanction pursuant to this section shall be imposed only after notice to the party against whom the sanction is proposed to be imposed and opportunity for that party to be heard." Because Candace's notice claim requires us to interpret section 271, it presents a question of law subject to our independent review. (*Petropoulos, supra*, 91 Cal.App.4th at p. 177.)

In *Petropoulos*, Wife claimed the court had failed to indicate its intent to consider an award of sanctions under section 271. On appeal, the court held that "Wife was well aware that she was subject to such sanctions even if the trial court did not expressly say so." (91 Cal.App.4th at p. 178.) In addition to the fact a special master had found that Wife's conduct would justify section 271 sanctions, the parties' pleadings demonstrated that Wife was aware she might be sanctioned under that statute. "[I]n an application filed prior to the court hearing, Husband requested that the court award fees based on Wife's conduct. Wife filed a response to that request in which she asserted that she 'should not be sanctioned under § 271.' Wife repeated that assertion in her trial brief, again with an express citation to section 271. Finally, at the hearing itself, at least one explicit reference to section 271 was made during the discussions about the procedure for submitting the fee issue." (*Petropoulos, supra*, at p. 178.)

In this case, the papers filed by John and Candace clearly placed conduct and section 271 sanctions at issue. In a declaration attached to his order to show cause filed February 27, 2004, John asked that the court order Candace to pay his attorney \$2,500 "for being forced to file this order to show cause." Based on estimates of the cost of preparing the order to show cause, John's attorney declared that Candace should be ordered to pay \$2,736.30 "for [her] obstreperous conduct in this matter." Candace likewise requested attorney's fees in the sum of \$5,036 pursuant to section 271 in the order to show cause that she filed on April 12, 2004, claiming that John had failed to cooperate in allowing her parenting time with Judith and arguing that the garnishment issue was moot at the time John filed his OSC. In responsive papers filed on April 30, 2004, John disputed Candace's assertions. He argued that "this case will NEVER settle down unless there is a large award of attorney's fees against the party the court deems is most obstreperous and problematic."

In ruling on a request for sanctions under section 271, the court considers "the extent to which the conduct of *each party* or attorney furthers or frustrates the policy of the law to promote settlement of litigation and . . . to reduce the cost of litigation" (§ 271, subd. (a), *italics added.*) Candace's express request for section 271 sanctions placed at issue both parties' conduct under that statute. Based on this

record, we conclude there is no merit to Candace's claim that she lacked notice of possible section 271 sanctions.

The next question is whether the record supports the trial court's implied finding that Candace "frustrate[d] the policy of the law to promote settlement of litigation and . . . to reduce the cost of litigation. . . ." (§ 271, subd. (a).) In addressing this question, "[w]e resolve all evidentiary conflicts in favor of the prevailing [party], and indulge all reasonable inferences possible to uphold the trial court's findings. [Citation.]" (*Jordan v. City of Santa Barbara* (1996) 46 Cal.App.4th 1245, 1254-1255 (*Jordan*).)

Candace and John each accused the other of frustrating settlement of the child support and parenting issues. Thus, Candace cannot say there was no evidence that she was the party who frustrated settlement. The question whether Candace did or did not cash the disputed child support checks is peripheral to the question whether she released the wage garnishment when repeatedly requested to do so. Given the conflict in evidence, we decline to disturb the trial court's finding that sanctions were warranted. (*Jordan, supra*, 46 Cal.App.4th at pp. 1254-1255.)

Next, Candace challenges the amount of sanctions, arguing that the order to pay \$9,000 "forthwith" imposes an unreasonable financial burden on her. Candace is correct that although a section 271 award focuses largely on litigation conduct, the

court must also consider the financial circumstances of the parties. (*In re Marriage of Hublou* (1991) 231 Cal.App.3d 956, 964 [construing former Civ. Code, § 4370.6, now § 271].) She stresses that John's household income is twice that of her household income. Although somewhat unclear from her brief, we will assume Candace disputes the amount of sanctions as well as the manner of payment.

By its terms, section 271 authorizes an award of attorney's fees and costs as sanctions. (§ 271, subd. (a).) It does not authorize imposition of sanctions in excess of attorney's fees and costs actually paid or to cover other types of losses claimed by the non-offending party. In points and authorities filed April 30, 2004, John stated that he had incurred \$3,981 in attorney's fees since January 2004, and estimated that he would incur an additional \$1,000 to prepare and attend the hearing on his order to show cause. We find nothing in the record to support the additional \$4,000 included in the award. Accordingly, we shall strike the amount of section 271 sanctions in excess of the actual attorney's fees and costs incurred by John as demonstrated by him on remand.

Candace's emphasis on the word "forthwith" and her citation to *In re Marriage of Schulze* (1997) 60 Cal.App.4th 519 (*Schulze*), supports our assumption that she challenges the court's order to pay the entire amount of sanctions at once. In *Schulze*, the appellate court held that the trial court abused

its discretion in ordering the noncustodial parent to pay \$7,500 in family support "forthwith" because "it [was] undisputed that neither party had any savings or liquid assets." (*Id.* at pp. 531-532.) It directed the trial court to provide that the obligation be paid in "manageable installments." (*Id.* at p. 533.) Here, Candace stated in April 2004 that she had only \$3,000 in liquid assets. Even with the reduced amount of sanctions, we conclude that the trial court abused its discretion in ordering Candace to pay John "forthwith." We shall direct the trial court to allow her to make payments in manageable installments. (*Schulze, supra*, at p. 533.)

DISPOSITION

We modify the May 2004 order by striking the section 271 sanctions in excess of the amount of attorney's fees and costs actually paid by John, to be proved in the trial court on remand. The trial court is also directed to allow Candace to pay the sanctions imposed under section 271 in manageable

installments. The order is affirmed in all other respects.
Each party shall bear their own costs on appeal. (Cal. Rules of
Court, rule 27(a)(4).)

CANTIL-SAKAUYE, J.

We concur:

BLEASE, Acting P.J.

NICHOLSON, J.